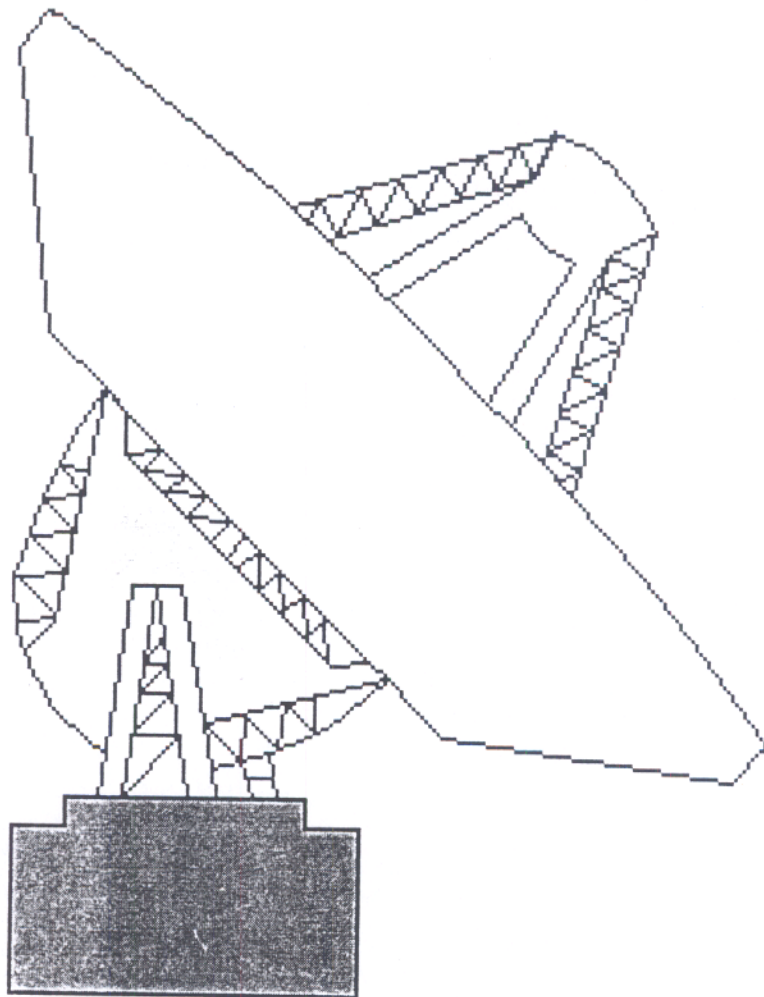


# Virginia Department of Taxation Nonprescription Drug Exemption Teleconference



## Question and Answer Summary

## Table of Contents

	Page
Part I: Product Classification Issues .....	1
Product Classification Index .....	15
Part II: Compliance Issues .....	17
Collecting and Reporting the Tax .....	17
Record Keeping .....	18
Part III: Other Issues .....	21
General Information on the Exemption .....	21
Customer Inquiries .....	21
Hospitals, Nursing Homes and Adult Care Facilities .....	22
Identifying Products .....	23
Notifying Manufacturers and Suppliers .....	24
Revenue Impact of the Exemption .....	25
Teleconference Videotape .....	25

Videotape and Summary Order Form

*This booklet contains answers to all of the questions received during the Nonprescription Drug Exemption Teleconference on June 25, 1998, both those we discussed on the air and those we could not include in the broadcast. Questions that were not discussed during the broadcast are indicated by an asterisk (\*). The answers are not an actual transcript of the responses given during the program, and may include additional information or clarification that we were not able to provide during the Teleconference. If you have additional questions, please feel free to contact us at (804) 367-8037.*

*Thank you for participating in the Teleconference. We look forward to working with you in implementing the new sales tax exemption.*

*The Teleconference Production Team*

## **PART I: PRODUCT CLASSIFICATION ISSUES**

- 1-1. If the Federal Food and Drug Administration (FDA) classifies an item as a drug, not a food or dietary supplement, will the Department of Taxation also classify it as a drug?**

We have not yet determined if there exists one specific publication or source, such as the Federal Food and Drug Administration (FDA), for use in determining taxable and exempt status of various products. As stated in the broadcast, we are looking at a number of references which we hope will serve as a basic guide in determining if an item or product is a qualifying nonprescription drug or proprietary medicine. We have consulted with the Virginia Pharmacists Association and the Virginia Board of Pharmacy for guidance in determining if an item is taxable or exempt.

The department does, however, consider the FDA's classification of an item as guidance in determining if an item meets the first test - is it a medicine or drug. However, some products will be classified by the FDA as a drug although they may not be intended to cure, prevent, mitigate, or treat a disease in humans. Therefore, while an item may be classified by the FDA as a nonprescription drug, we must look at other criteria in determining whether the product is exempt or taxable for purposes of the exemption.

- 1-2.\* Does the term "bee sting reliever" include preventives, such as OFF?**

See Question 1-3.

- 1-3. Insect bite and sting preparations are listed in the Tax Bulletin as being exempt. Will bug repellents also be exempt?**

Insect bite and sting preparations are listed as exempt because they contain medicine and are used as topical treatments in the prevention of infection or to prevent an allergic reaction. Bug repellent is used to repel bugs and insects to avoid bug bites and would be taxable. The ingredients in bug repellent are not intended to prevent or treat disease in humans, but instead act on insects to keep them away from humans. Therefore, bug repellents do not qualify as a nonprescription drug or medicine for purposes of the exemption.

- 1-4. Are cosmetics that offer SPF protection exempt?**

Cosmetics are items used for cleansing, beautifying, promoting attractiveness, or altering the appearance. The statute specifically provides that this exemption does not apply to cosmetics. A product which is a cosmetic is not "medicine" even though it may have medicinal properties.

Based on the language of the exemption, It is the intent of the law to tax cosmetic products. Therefore, items such as foundation makeup, beauty creams, and daily moisturizers that include SPF protection are considered cosmetic in nature and are taxable.

**1-5. Are cosmetics containing other medications, such as acne preparations, exempt?**

As explained under Question 1-4, a product that is primarily cosmetic in nature is not a nonprescription drug, even though it may contain medicinal ingredients. The inclusion of substances such as acne treatment ingredients serves as a secondary function to the intended use of the product. Contrast this with an acne treatment product that is intended solely for topical use in treating and/or preventing acne, and that would qualify for the exemption. As with cosmetics containing sunscreen, cosmetic products that contain other types of medicinal ingredients remain subject to the sales tax.

**1-6. Bath crystals are taxable. What about Aveeno products -- are they considered bath products or itch and rash relievers?**

Based on information we have obtained from the 1996 American Drug Index, Aveeno is marketed in different forms for many different purposes. For example, there is Aveeno Anti-Itch, Aveeno Medicated Bar, Aveeno Regular Bar, Aveeno Bath, Aveeno Shave, and a number of other Aveeno products that may or may not be exempt based on the ingredients they contain and the intended purpose of the product. Some Aveeno products contain a medicine or drug, while others do not. This is an example of a line of products that the department would need to evaluate on an individual product basis to determine whether or not the exemption applies.

**1-7.\* Dial soap (antiseptic soap) is sometimes recommended by physicians for certain skin problems. Is it exempt?**

See Question 1-8.

**1-8. Does the exemption include antibacterial soap?**

Yes. To qualify for the exemption, the product must be: i) a medicine or drug; ii) intended for topical or internal use; and iii) used for the cure, mitigation, treatment, or prevention of a disease in human beings.

Certain soaps qualify for the exemption - germicidal soap, surgical soap, and therapeutic soap. These soaps contain several drugs and are effective against bacteria in treating or preventing disease. Based on the information we have

received from the FDA, antibacterial soap also contains several drugs and is basically the same as germicidal soap. Antibacterial soap is effective against bacteria, while germicidal soap contains an agent that kills germs. Because antibacterial soap is used in essentially the same manner as germicidal soap and contains nonprescription drugs, it qualifies for the exemption.

**1-9. Are antibacterial products exempt if they meet the statutory requirements?**

See Question 1-10.

**1-10. Are all antibacterial products exempt? Last week, for example, we were told that antibacterial lotions and jellies would be taxable. Please clarify.**

As a general rule, antibacterial products will be exempt. This includes antibacterial lotions and antibacterial gels or petroleum jelly products.

**1-11.\* Are medicated wipes, swabs and pads exempt?**

See Question 1-13.

**1-12.\* Are medicated bandages and dressings exempt?**

See Question 1-13.

**1-13. Are Band-aids with antiseptic or bacterial control products in the pad exempt?**

Band-aids and bandages are designed to protect cuts, scrapes, and wounds. They also are intended to keep cuts, scrapes, and wounds clean in order to prevent infection. However, bandages without medication fail to satisfy the first test in qualifying for exemption - they do not contain nonprescription medicines or drugs.

Band-aids with antiseptic or bacterial control products in the pad do contain a medicine or drug. Furthermore, bandages with antiseptic are intended for topical use. Finally, bandages with antiseptics not only protect cuts, scrapes, and wounds, they also prevent infection. Therefore, all criteria for exemption are satisfied and the product may be purchased exempt of the tax. The same holds true for medicated dressings, swabs and wipes.

**1-14. Why aren't vitamins going to be exempt? People use them to prevent diseases.**

The department considered FDA and other industry guidelines very closely in

developing classifications of exempt and taxable items. Under those guidelines, vitamins are classified as food supplements. Since Virginia's nonprescription drug exemption does not extend to food items, these products will continue to be subject to sales tax.

If purchased on the written order or prescription of a physician, vitamins may be sold exempt of the tax. This is because there is a separate exemption from the sales and use tax for items sold pursuant to a prescription or work order of a licensed physician or other specified health professional.

**1-15. Is toothpaste with peroxide exempt? What about toothpaste with fluoride?**

As discussed under Question 1-8, in determining if a product or item qualifies for the exemption, three questions must be addressed: (1) Is the item a nonprescription drug or proprietary medicine? (2) Is the product sold for internal or topical use? and (3) Is the product sold for the cure, mitigation, treatment or prevention of disease in human beings?

Toothpaste, generally speaking, is a product held out for sale for grooming purposes. Based on the information we have seen, the purpose of toothpaste with peroxide or fluoride added is to provide fresh breath and whiter teeth. Therefore, toothpaste containing peroxide and/or fluoride is taxable.

**1-16. Are food supplements, such as Ensure, exempt? What about other adult-care products, such as adult diapers?**

As explained under Question 1-14, food supplements are not covered under the exemption. Products such as adult diapers are devices, which are also taxable.

**1-17. Explain the policy for contact lens solutions.**

Contact lens solutions, as opposed to medicated solutions which go into the eye, are applied to the lens (a device), not to the body. Therefore, they do not meet the definition of a nonprescription drug, because they are not intended for internal or topical use.

**1-18.\* Are contact lens lubricating solutions taxable or exempt?**

Contact lens rinsing/storage solutions are for rinsing and storage of contact lenses. Soft contact lenses must be maintained in saline solution to prevent the contact from becoming brittle. Contact lens solutions are important to the care of the lens itself, to prevent the accumulation of protein deposits and to remove other debris. Items such as Enzymatic cleaner, daily cleaner, disinfecting solution, and saline solution are preparations applied to the contact lens for

maintenance of the lens; these products are not designed for topical use on humans.

Contact lens lubricating solutions such as rewetting drops, opti-tears, and other solutions designed to be applied directly in the eye qualify for exemption, provided the other exemption criteria are satisfied.

**1-19\* Why aren't contact lens products considered cosmetic or "beautification" products like toothpaste with peroxide?**

Cosmetics are generally defined as products intended to be applied to the body for cleansing, beautifying, promoting attractiveness, or altering the appearance. Contact lens products used for rinsing/storage, cleaning, and disinfecting contact lenses do not satisfy this definition.

Contact lens lubricating or wetting solutions are used directly in the eyes. These products also do not fall within the general definition of a cosmetic product. They are not intended to beautify or promote attractiveness, but instead are designed to rehydrate the eyes.

**1-20.\* Could you distinguish specifically which contact lens solutions are taxable and which are exempt? Lubricating and wetting solutions are considered nontaxable, while saline solution is taxable. From my experience, saline solution is used for wetting and lubricating. What about multipurpose solutions used for cleaning, disinfecting, and lubrication?**

Saline and multipurpose solutions are products intended for disinfecting, storing, cleaning, and rinsing contact lenses prior to insertion into the eyes. While it has been suggested that multipurpose and saline solutions are used as a lubricating and wetting solution in the eye, the label does not indicate that the product is intended for such use.

**1-21. Are sunscreens exempt?**

Sunscreen products containing SPF ingredients are exempt.

**1-22. Sunburn lotions are on the exempt list. Can you specify what is covered?**

Any sunburn lotion which contains nonprescription drugs or medicines and is used to relieve the symptoms of sunburn pain is exempt. Such products include Solarcaine, Lanacaine and various other burn treatments. The key to this exemption is that the product must contain ingredients or components which can be classified as drugs or medicines, and the product's primary purpose must be to treat or prevent disease in human beings.

**1-23. Cold and diet pills contain the same decongestant. How do you distinguish between them for purposes of the exemption?**

Cold pills are medicines used to treat an illness. While diet pills may contain nonprescription drugs, they are used as appetite suppressants as an aid in weight loss. Therefore, although diet pills meet two of the criteria for the exemption (they contain a nonprescription drug and are used internally), they are used as food supplements, rather than in the cure, mitigation, prevention or treatment of disease.

**1-24. How do you separate medicated dandruff and seborrhea preparations and hair restoration products to decide which ones are exempt?**

The three-part legislative test described under Questions 1-8 and 1-14 must be applied to every product to determine whether it qualifies for the exemption. Medicated shampoos, such as dandruff and seborrhea preparations, qualify for the exemption because they meet all three criteria -- they contain nonprescription drugs, they are intended for topical use, and they are used to treat a specific medical condition. Hair restoration products meet the first two criteria, but are intended primarily to alter the appearance. As a result, these products are considered cosmetics, which are specifically excluded from the exemption.

**1-25. How do you distinguish between laxatives that qualify for the exemption, and herbal teas that are used for the same purpose?**

See Question 1-26.

**1-26. Diuretics and laxatives are listed in Tax Bulletin 98-4 as being exempt. Many of these products list "natural" or "herbal" ingredients as being the major components of the product. Herbal products, such as teas, pills, and supplements, are listed as taxable in the Tax Bulletin. How would laxatives and diuretics with natural or herbal ingredients be treated for purposes of the exemption?**

Any products that list "natural ingredients" and "herbal ingredients" as the active components will be taxable if they do not contain a nonprescription drug or proprietary medicine. We must keep in mind that the exemption is applicable to "nonprescription drugs" and "proprietary medicines" only, and only if the nonprescription drug or medicine is used in the cure, mitigation, treatment, or prevention of a disease.

If a diuretic or laxative contains a nonprescription drug, the department will consider it an exempt product, even if it contains components such as natural ingredients or herbal ingredients which would normally be taxable. Herbal

preparations that do not contain a nonprescription drug are considered food supplements, and will not be exempt.

**1-27. Would any product labeled “medicated” be exempt?**

We are not prepared at this time to say that all medicated products qualify for the exemption. Even if this term signifies that the product contains a medicine or drug, we must consider whether the product is intended for the prevention, cure, mitigation or treatment of disease in human beings. While the majority of products labeled “medicated” may qualify for the exemption, we prefer to evaluate individual products under the three criteria specified in the law, rather than basing the taxable status on labeling alone.

**1-28. How is the department classifying products like Beano, which are used to prevent gastro-intestinal discomfort? This particular product is taken as a preventative rather than a curative.**

This product is labeled as a “dietary supplement” and “a food enzyme from a natural food source.” Information from the FDA indicates that when a product is labeled as a dietary supplement, the product is not regulated as a drug. As noted in the Tax Bulletin, the exemption does not apply to food products and supplements. Therefore, Beano would not be exempt.

With respect to similar products, additional research will be required before we can determine the taxable or exempt status on a number of specific products. We intend to look at unique products on a case by case basis and consult recognized authorities, publications, and other sources with expertise in the area of drugs and medicines. We often consult with the Virginia Pharmacy Board, the MCV Drug Hotline, the American Drug Index, and other sources of information before making a determination on a product’s taxable or exempt status.

**1-29. Why are Epsom salts exempt?**

Epsom salts are classified as exempt because they are used medicinally as an anti-convulsive. Although Epsom salts also have number of non-medicinal uses, the department would not expect retailers to question customers as to how they intend to use a product for purposes of determining the taxable or exempt status at the point of sale.

**1-30\* Condoms are used to prevent the spread of disease. Are they exempt?**

See Question 1-31.

**1-31. Are contraceptive creams containing Nonoxynol 9 (for prevention of the spread of HIV) exempt?**

We recognize that contraceptive products represent a controversial area in applying the exemption, particularly those products which claim to prevent the spread of HIV or venereal diseases.

The department looks to the three determining factors or criteria discussed in the teleconference to determine whether a product falls within the scope of the exemption: i) is it a nonprescription drug, that is, is the product a substance or mixture of substances containing medicines or drugs for which no prescription is required; ii) is the product for topical or internal use; and iii) is it for the cure, mitigation, treatment, or prevention of a disease in human beings.

In the case of birth control preparations which are intended to prevent pregnancy, most satisfy the first two tests to qualify for exemption - the preparations contain a nonprescription drug and are sold for internal or topical use. The main issue is whether the product is sold for the prevention, cure, mitigation, or treatment of disease in human beings. In making this determination, we look at the purpose for which the product is intended. Our initial analysis is that birth control preparations are intended to prevent unwanted pregnancies and do not prevent, cure, mitigate, or treat a disease. Therefore, the third factor is not satisfied and the exemption is not applicable.

In the case of contraceptive creams with Nonoxynol 9 (for the prevention of the spread of HIV), information we have reviewed indicates Nonoxynol 9 prevents a variety of sexually transmitted diseases. Each product must be evaluated to determine if it is intended to cure, mitigate, prevent, or treat a disease. Our initial assessment is that the inclusion of Nonoxynol 9 in a contraceptive cream serves to prevent disease and qualifies for the exemption.

Barrier contraceptives, such as condoms, do not qualify for the exemption because they are devices and, based on our information, are not deemed to be medicines or drugs under federal and state drug control and classification laws.

**1-32. Are lip balms exempt? For example, Chapstick vs. Medicated Chapstick.**

Lip balms may or may not be exempt, depending on the ingredients contained in the product. In the example provided above, our position is that Medicated Chapstick contains a medicine or drug for the purpose of treating some type of malady and qualifies for exemption. Another example of an exempt lip balm is Blistex which is medicated and used to treat fever blisters and canker sores.

**1-33.\* How is the department going to handle homeopathic drug compounds?**

The department uses Food and Drug Administration (FDA) guidelines for guidance in the classification of vitamins, minerals, herbal and natural products for purposes of the exemption. Based on information obtained from the FDA, vitamin and mineral supplements, herbal products, and products that contain other similar nutritional substances that expressly or implicitly claim to treat, prevent or cure disease in human beings are recognized by the FDA as drugs and have to meet the safety and effectiveness standards for drugs under the Federal Food, Drug, and Cosmetic Act (FDCA). These items are recognized in the official Homeopathic Pharmacopeia of the United States.

If a homeopathic product is classified as a drug by FDA, is used internally or topically, and for the cure, treatment, mitigation, or prevention of disease in human beings, the product would be exempt.

**1-34.\* Are homeopathic medicines (manufactured and packaged as such) exempt?**

"Homeopathy" is defined in the *American Heritage Dictionary* as "a system of medical treatment based on the use of minute quantities of remedies that in massive doses produce effects similar to those of the disease being treated." Because the term "homeopathic" does not, in and of itself, denote whether a product meets the three-part test discussed under Questions 1-8 and 1-14, we would need to evaluate homeopathic medicines on a case-by-case basis to determine if they qualify for the exemption.

**1-35.\* Is ammonia used for inhalation exempt?**

Ammonia is a chemical and not classified as a drug or medicine. While it may be for internal use because it is inhaled, it is not a nonprescription drug or medicine and, therefore, does not qualify for exemption.

- 1-36.\* Are glycolic acid products with a concentration greater than 12% that must be sold by physicians, and are recommended and sold by dermatologists to treat disorders such as acne, melasma and solar elastosis, exempt? Glycolic acid is not a controlled drug.**

Glycolic acid is a colorless crystalline compound used in pharmaceuticals, pesticides, adhesives, and plasticizers. Based on information obtained by the department, glycolic acid is considered a cosmetic used for smoothing skin, removing age spots and wrinkles, and for skin lightening for the purpose of beautifying, promoting attractiveness or altering the appearance. While glycolic acid with higher concentrations may be issued by physicians and dermatologists, the primary purpose of the product remains the same in that it is used to enhance the appearance. As a cosmetic, this product does not qualify for exemption.

- 1-37.\* I am employed at a veterinary hospital. We use human as well as veterinary drugs to treat and prevent disease in animals. Are these nonprescription drugs for humans eligible for exemption under the listed criteria? Even though the drugs are intended to be used for human beings, we use them for animals in our practice.**

The statute specifically limits this exemption to medicines and drugs used to cure, mitigate, prevent, or treat disease in human beings. While the strict interpretation of this exemption is limited for use in human beings, the department will not require a retailer to inquire about the use of the product in determining the taxable or exempt status. The department will look to the purpose of the product in order to determine if it is taxable or exempt. If a product is a nonprescription drug, for internal or topical use, and is intended to treat a disease in human beings, the product will be exempt. The fact that the purchaser elects to administer the product to animals does not affect the exempt status of the product.

- 1-38.\* Are pediatric oral rehydration products exempt (for example, Pedialyte)?**

Pedialyte products are oral electrolyte mixtures which contain table salt, potassium salt, baking soda, and sugar. These products are predominantly used to treat dehydration in infants and children. Pedialyte is not considered a nonprescription drug and would not enjoy the exemption.

- 1-39.\* Are eyeglasses exempt?**

Eyeglasses sold on prescription or work order of an optometrist or ophthalmologist are exempt under § 58.1-609.7(1) of the *Code of Virginia*. Nonprescription eyeglasses and sunglasses are taxable.

**1-40.\* Is clove oil exempt?**

Clove oil is an aromatic oil distilled from the dried flower buds of the clove tree and used in medicine as an antiseptic. Clove oil is generally used to relieve pain resulting from a toothache. Clove oil is not considered a nonprescription drug and would not be exempt when marketed in its natural form.

**1-41.\* Are vaginal douches exempt?**

Generally, vaginal douches are used as hygiene products, rather than for the cure, mitigation, prevention, or treatment of a disease, and are taxable. However, it is our understanding that certain vaginal douches do contain nonprescription drugs and medicines and are used for the treatment of vaginal infections and other conditions, and would be exempt. This is an example of an item that would have to be evaluated on a product by product basis to determine the tax application.

**1-42.\* Is AD ointment exempt?**

AD ointment is an ointment containing both vitamin A and vitamin D. Because vitamins are not considered nonprescription drugs, AD ointment would not enjoy the exemption.

**1-43.\* My wife is a diabetic, and I am an asthmatic. Her syringes and insulin are by prescription, but my question relates to not just her testing kits. Are the testing and/or monitoring equipment needed for use with the testing procedures also exempt? Also, are the pulmonary testing monitors, testing units, and other monitoring needed for controlling my asthma exempt?**

The exemption does not apply to testing and/or monitoring equipment, regardless of the illness being monitored. In order for a product to be exempt, it must meet the three criteria set forth in the statute in order to qualify. While testing and monitoring equipment may be useful in determining the proper medicine and dosage to be administered, this equipment does not meet the three criteria set forth in the exemption statute. As provided in the May 15, 1998 Tax Bulletin (98-4) this exemption does not apply to devices, which includes contraceptive items, birth control preparations, and testing kits.

**1-44.\* Is saline solution used as an IV or irrigation solution exempt? What about saline used for inhalation?**

Generally, plain saline solutions do not contain any medicine or drugs and, therefore, do not qualify for the exemption because they do not meet the first test

set forth in the statute. If a saline solution contains nonprescription drugs and is to be used internally, such as the IV example above, and is intended to treat or prevent a disease, it would qualify for the exemption.

**1-45.\* Is aloe vera lotion considered a medicated lotion for purposes of the exemption?**

Aloe vera is a natural ingredient derived from the leaves of an aloe plant. Generally, a lotion containing aloe vera does not qualify for the exemption because it does not contain nonprescription drugs and is not labeled as a medicated lotion. If the aloe vera lotion contains nonprescription drugs and is labeled as a medicated lotion, the lotion would qualify for the exemption.

**1-46.\* How are combination packs of items (for example, vitamins sold with ibuprofen) treated for purposes of the exemption?**

Packages containing both taxable and exempt items sold as a single unit are subject to the sales tax, as discussed under Question 1-47.

**1-47. Based on the department's current approach, if a dealer sells first aid kits that contain both taxable and exempt products, would this be a taxable or exempt transaction? How would the exemption apply to restocking first aid kits?**

Sales of first aid kits which contain both taxable and exempt items will be taxable, with the tax computed on the total sales price. This approach is consistent with department policy in many areas where exempt items and taxable items are packaged together and sold for one unit price. If a vendor of first aid kits chooses to segregate all component parts of the content of the kit, and separately identify the charge or sales price for each item, the tax would apply only to those items which are taxable.

Restocking of such kits may be taxable or exempt depending on the nature of the individual and separate items being purchased. Here again, if the supplier charges one lump sum for both taxable and exempt restocking items, the total charge would be taxable. If the charge or sales price for exempt items is separately stated, the nonprescription drug exemption would apply to those items and tax would not be charged.

**1-48.\* Are herbal products with OTC registration exempt? For example, herbal dandruff shampoo with OTC registration claims a health benefit.**

Products that require OTC (Over the Counter) Registration do not necessarily qualify as a nonprescription drug or medicine which enjoys the exemption.

Herbal products that require OTC registration may or may not qualify for the exemption, depending on what the herbal product contains. If the product contains all natural ingredients and no medicines or drugs, the exemption would not apply. If the herbal product contains medicines or drugs, is used internally or topically, and for the treatment or prevention of disease in human beings, the product would be exempt.

Products that require OTC Registration do not qualify for the prescription drug exemption because they do not require a written work order or prescription of a licensed physician, even though the pharmacist must record all sales.

**1-49\* Are vitamin and herbal products used specifically as antifungals, or for ear wax removal, headache relief, muscle ache relief, etc. taxable or exempt? They are used in the same way other exempt products are.**

Generally, vitamins and minerals are considered food supplements. The department is working closely with the FDA and other industry guidelines in determining whether certain products fall under the exemption. It is our understanding that there are vitamin and mineral products on the market that the FDA classifies as drugs and medicines, based on the labeling of the product and the product's claim of curing, mitigating, preventing or treating a disease in human beings. The department will look at these items on a product by product basis and, based on information received from FDA and other sources, make a determination of the tax status. Unfortunately, based on the nature and purpose of products such as vitamins and minerals, we are unable to issue a blanket exemption.

**1-50\* Are sensitive care products exempt? Is sensitive/dry skin classified as a disease?**

Sensitive care products cover a host of products, from "soap free" cleansers that neutralize pH and are less irritating to sensitive skin to medicated products which may treat a number of medical conditions. The department will look at these products the same way as Aveeno products (see Question 1-6), that is, based on the ingredients they contain and the intended purpose of the product.

**1-51\* Are nebulizers used for the treatment of asthma, pneumonia, etc. tax exempt products? What about the medicines used with them?**

Nebulizers are devices used to administer drugs and medicine for the treatment of asthma, pneumonia, etc. As provided in Virginia Tax Bulletin 98-4, this exemption does not apply to devices, which would include nebulizers. Nebulizers would qualify for the sales and use tax exemption under *Code of Virginia* § 58.1-609.7(2), the exemption for durable medical equipment.

Any nonprescription drugs or proprietary medicines administered through a nebulizer would be exempt. These medicines and drugs would meet the criteria for the exemption because they are nonprescription drugs, for internal use, and are use for the purpose of treating an abnormality in human beings.

**1-52\* Acne is not a true disease, is it? Its treatments vary and they don't always cure, so why would the creams sold over the counter be tax exempt? What about Noxzema?**

Acne is an inflammatory disease of the oil glands. Acne treatment products that contain a nonprescription drug and are intended for topical use in the treatment, prevention, cure, or mitigation of acne in human beings qualify for exemption. Acne treatment products meet the three criteria set forth in the statute and qualify for exemption.

Noxzema is marketed in different forms for many different purposes. For example, there is Noxzema Clear Ups, Noxzema Medicated Skin Cream, Noxzema Cleanser, and a number of other products that may or may not be exempt based on the ingredients they contain and the intended purpose of the product. Some Noxzema products may contain nonprescription drugs, while others do not. The department would need to evaluate on an individual product basis to determine whether or not the exemption applies.

## Product Classification Index

	Question #
Acne preparations .....	1-52
Added to cosmetics .....	1-5
AD ointment .....	1-42
Adult diapers .....	1-16
Aloe vera lotion .....	1-45
Ammonia, for inhalation .....	1-35
Antibacterial products .....	1-9, 1-10
Aveeno products .....	1-6
Band-Aids, medicated .....	1-13
Beano .....	1-28
Birth control preparations .....	1-31
Clove oil .....	1-40
Combination packages, taxable and exempt products .....	1-46
Condoms .....	1-30, 1-31
Contact lens solutions .....	1-17
Cosmetic, does not meet definition .....	1-19
Lubricating solutions .....	1-18
Multi-purpose solutions .....	1-20
Saline solution .....	1-20
Contraceptive creams .....	1-31
Cosmetics	
Containing SPF ingredients .....	1-4
Containing other medications .....	1-5
Diet pills, containing decongestant .....	1-23
Ensure .....	1-16
Epsom salts .....	1-29
Eyeglasses .....	1-39
FDA classifications, conformity with .....	1-1
First aid kits .....	1-47
Food supplements .....	1-16
Glycolic acid products .....	1-36
Hair restoration products .....	1-24
Herbal products	
Antifungals .....	1-49
OTC registration .....	1-48
Pain relief products .....	1-49
Teas, laxative .....	1-25
Homeopathic remedies	
Drug compounds .....	1-33
Labeled as "medicines" .....	1-34

Insect repellent .....	1-2, 1-3
Laxatives .....	1-25, 1-26
Lip balms .....	1-32
Medicated products	
Band-Aids .....	1-13
Bandages and dressings .....	1-12
Dandruff and seborrhea products .....	1-24
Labeled as "medicated," exemption not automatic .....	1-27
Lip balms .....	1-32
Wipes, swabs and pads .....	1-11
Nebulizers and associated medicines .....	1-51
Noxzema .....	1-52
Pedialyte .....	1-38
Pediatric oral rehydration products .....	1-38
Saline solution	
Contact lens solution .....	1-20
IV or irrigation solution .....	1-44
Inhalation .....	1-44
Sensitive care skin products .....	1-50
Soap	
Antibacterial soap .....	1-8
Dial soap .....	1-7
Sunburn lotions .....	1-22
Sunscreen products, containing SPF .....	1-21
Testing and monitoring equipment .....	1-43
Toothpaste, containing peroxide or fluoride .....	1-15
Vaginal douches .....	1-41
Veterinary use of nonprescription drugs .....	1-37
Vitamins .....	1-14

## **PART II: COMPLIANCE ISSUES**

### **COLLECTING AND REPORTING THE TAX**

**2-1.\* Are there any forms we will be required to send in?**

No. Sales made under the new exemption will be included with all other exempt sales on your regular sales tax return, Form ST-9.

**2-2. Can we group food stamp sales and nonprescription drug sales in one total, or do we need to separate these two categories from each other?**

With respect to reporting these items on your sales tax return, all exempt sales are reported as a single deduction on line 4 of Form ST-9.

**2-3.\* What are the penalties for not collecting taxes on the correct items?**

As Commissioner Payne explained in the broadcast, the next twelve months will be a period of transition to the new exemption provisions. During this time, our emphasis will be on education rather than compliance, and we will make every effort to assist retailers in collecting the proper tax. If you have questions about the taxable status of products in your inventory, please contact our Customer Service Section at (804) 367-8037.

**2-4. How will vending machine vendors who sell aspirin and other nonprescription drugs report these sales?**

A vending machine operator, who is reporting and paying the 5 1/2% retail sales and use tax on the cost price of all items sold through their vending machines, would no longer be required to pay the tax on their purchase of any nonprescription drug. This amount would be deducted on Line 2c of the worksheet and Line 2d on the return.

Vending machine operators who have received authorization to pay 4 1/2% tax based upon gross receipts and other dealers who use vending machines at their businesses may deduct all sales of nonprescription drugs from gross sales on Line 4 of the Retail Sales and Use Tax Return, Form ST-9.

**2-5.\* Is there a city or county tax that has to be collected on non-exempt items?**

The 4.5% sales tax collected on sales of non-exempt items includes both the 3.5% state tax and the 1% local tax. No separate collection of local sales tax is required.

- 2- We are under a rack service program. Starting this week (last week of June), products that were brought in had either taxable or tax-exempt on the price sticker. Products already on the shelf had no such sticker. Do we sell those items tax-exempt, or tax them while we give time for the product to work itself out?**

If a product is sold on or after July 1, and it meets the three-part test for the new exemption, the exemption applies regardless of how the product was initially labeled. If the tax is collected on an exempt item, that tax must be remitted to the Department of Taxation with your regular monthly sales tax return, unless you refund the tax to the customer.

- 2-7.\* If I retail vitamin and mineral supplements to patients within my medical practice, are these items exempt from sales tax? If they are exempt, must I write an actual prescription blank or can these exempt sales proceed based upon my recommendation alone?**

Vitamin and mineral supplements do not qualify as "nonprescription drugs" or "proprietary medicines" and are generally not exempt from the tax when sold at retail. Vitamins and minerals dispensed by or sold on written prescription or work orders of a licensed physician would be exempt. Therefore, a written prescription is required to satisfy the criteria for exemption.

- 2-8. Are there any liability implications if wholesalers or manufacturers identify a nonprescription drug product incorrectly? If the manufacturer or wholesaler coded the products, what would the liability be to them if tax was not charged properly based on their coding?**

Wholesalers and manufacturers will not incur any liability if they make a good faith effort to comply with the policy set forth in Tax Bulletin 98-4. It must also be kept in mind that the exemption is actually applied at the retail level.

## **RECORD KEEPING**

- 2-9. What type of record keeping is needed for small businesses that do not maintain sales invoices?**

Our record keeping policy has not changed. Dealers should maintain a daily record of all cash and credit sales. Instead of invoices, these records may be cash register tapes, a daily sales sheet, or a sales journal. What is important is that you keep a record of gross sales in a way that lets you segregate your exempt sales from other sales. This will make it easier to compute your deduction for your sales tax return.

- 2-10. Our supplier provides a multi-page printout of all inventory items that we purchase. It is very long, and the nonprescription drug items are intermingled with other purchases. Do they need to be segregated further? This would be very time consuming.**

Retaining the printout in your records is adequate. You do not need to separately document the exempt items included in the list.

- 2-11. If an invoice includes both taxable and nontaxable items mixed on one page, can we just highlight the nontaxable items?**

Yes. This method will provide adequate documentation for purposes of the exemption.

- 2-12.\* How do you keep records of purchases separate when all items are exempt, such as durable medical equipment, prescriptions and paper products all intermixed on the same invoice?**

If different vendors are used for different types of purchases, keeping a list of the vendors you purchase nonprescription drugs from is adequate. If you use inventory controls, coding these purchases to a separate account would be another way of separating these items. If the volume you purchase is low, you may simply highlight the purchases on the invoice.

- 2-13. Do I need to identify the products sold for each exempt sale?**

No, you do not need to identify the specific product; however, you will need to identify the sale as an exempt sale. You can then use this information to deduct these sales on Line 4 of your sales tax return. Some options that may help you gather this information are to designate a key on your register as an exempt sale key, or keep a log of these sales by your register.

- 2-14. We are using a diabetic key on our register now. Can we use this same department key for nonprescription drugs since they are also nontaxable?**

It would be preferable to use a separate key for nonprescription drug sales, because the diabetic exempt sales may include products not covered under the nonprescription drug exemption.

- 2-15. I have a separate register key for nontaxable sales that is used only for food stamp sales. Can I use the same key for nonprescription drug sales?**

The Department has no objections to using the same register key for exempt nonprescription drug sales, provided this does not violate any requirement

imposed by other regulatory agencies who monitor food stamp sales, and the vendor can segregate food and drug sales by some other means.

**2-16.\* Do the new tax-exempt items need to be kept on a separate record from previously exempt items?**

No. As long as the sales can be easily identified, no separate record is required.

**2-17.\* Do I have to keep nonprescription drug sales separate from other tax-exempt sales?**

These sales invoices should be kept in the same manner you are currently using for your other sales records. Additionally, these sales will be reported on the same line of your sales tax return as your other exempt sales.

**2-18.\* Is there a state requirement that the cost of purchases of nontaxable products be kept separately, such as the current requirement for prescriptions and Class II drugs?**

No, there is no requirement for keeping this information separately. You should keep records of these purchases using the same method currently in place for your other inventory items.

**2-19.\* When conducting a sales tax audit, most register tapes will not provide enough information to determine if an item sold was taxable or exempt with reference to the new exemption. What documentation is necessary to show that an item on the tape was exempt?**

Although a tape will not show the specific item sold, it should show that the transaction was an exempt sale of nonprescription drugs. This information, combined with your purchase documentation and inventory information can be used to support the exempt sales.

**2-20. How long must sales tax records be kept? Can records be kept on file at the corporate office, or must they remain in the unit that sold the products?**

Our record retention policy has not changed. Sales tax records must be retained for three years. There are no specific requirements as to where the records must be held.

## **PART III: OTHER ISSUES**

### **GENERAL INFORMATION ON THE EXEMPTION**

- 3-1. How is the average layman able to define a product as tax-exempt without having a clear knowledge of what is in the product?**

We recognize that this is a new exemption, and that there will be many questions. We have tried to provide good guidance, but we will need to continue to focus on customer education to help clarify and refine issues. If you need help in classifying products, please contact our Customer Service Section at (804) 367-8037.

- 3-2. The Virginia sales tax is comprised of two components -- the 3.5% state tax, and the 1% local tax. Does the repeal of the 3.5% state tax automatically repeal the local tax?**

The new exemption applies to the entire 4.5% sales tax, both state and local.

- 3-3. What are the other states that have a nonprescription drug exemption?**

Connecticut, Florida, Illinois, Maryland, New Jersey, New York, Pennsylvania, Rhode Island, and the District of Columbia all exempt nonprescription drugs from sales tax.

- 3-4. In reference to the exemption for samples of nonprescription drugs and proprietary medicines distributed free of charge by the manufacturer, what is considered "constituent elements and ingredients"?**

Constituent elements and ingredients include any component part of a nonprescription drug or proprietary medicine distributed free of charge and packaged with the sample. For example, if a sinus reliever contains stimulants such as caffeine, the caffeine would be a constituent element or ingredient.

### **CUSTOMER INQUIRIES**

- 3-5. What should I do if my customer refuses to pay tax on an item that I believe is taxable?**

If a customer is adamant about not paying the tax on an item you believe is taxable, do not charge tax on that single transaction. As soon as possible, contact our Customer Service Section at (804) 367-8037 to get verbal confirmation on the taxable status of the product for future sales.

**3-6. Will the Department of Taxation issue refunds if retailers do not properly exempt items?**

Refunds will be issued to retailers only when the retailer can provide documentation showing that the improperly collected tax has been refunded to the customer.

**3-7. Where can people write or call to get clarification, instructions, and interpretations concerning the new exemption?**

Call us at (804) 367-8037, fax your request to (804) 367-0985, or write to Post Office Box 1115, Richmond, Virginia 23218-1115. You can also E-mail questions through our Web page at <http://www.state.va.us/tax>.

**HOSPITALS, NURSING HOMES AND ADULT CARE FACILITIES**

**3-8. Can for-profit hospitals and nursing homes now buy nonprescription drugs exempt of the tax? What about their prescription drugs?**

This exemption is applicable regardless of the nature of the purchaser. Therefore, nonprescription drugs and proprietary medicines may be purchased tax exempt by individuals, physicians, and medical facilities, including for-profit hospitals and nursing homes.

The exemption for nonprescription drugs and proprietary medicines has no impact on purchases of prescription drugs by for-profit hospitals and nursing homes. These entities must continue to pay sales tax on prescription drugs purchased in bulk and used in providing their services. The only prescription drugs which may be sold to a for-profit hospital or nursing home exempt of the tax are those prescription drugs purchased as a result of a written prescription for a particular patient under the care of the for-profit hospital or nursing home. The new exemption did not change this established policy.

**3-9.\* With reference to for-profit long-term care facilities, do the exemption guidelines vary depending on whether the item is sold to an individual, or sold to a company on behalf of an individual?**

See Question 3-11.

**3-10.\* Currently, our pharmacy, which is exclusively a long-term care nursing facility provider, dispenses medication on a 24-hour unit dose basis. These medications are dispensed patient-specific. Occasionally we dispense a multi-dose product and charge it to the facility. The facility then**

charges the individual patients for that product when they administer the medication. Since the medication was charged to the facility and not to an individual patient, we have been charging sales tax to the facility. Will these products be tax-exempt if they meet the criteria?

See Question 3-11.

**3-11. Does the tax apply to items sold in nursing homes and homes for adults?**

The exemption applies to sales of exempt products regardless of the nature of the purchaser, and without regard to the seller. Therefore, exempt products sold in nursing homes and homes for adults are not subject to taxation.

**IDENTIFYING PRODUCTS**

**3-12. How is a business with no programmable registers supposed to have its employees keep up with what is taxable or exempt?**

The department has been working with the National Wholesale Dealers Association and others in an effort to make it easier for retailers. One service merchandiser has indicated they are printing the words "no tax" on their pricing labels so that the retail employees can easily identify exempt items. Another idea is to use color coded labels to indicate an exempt item. These are just a few methods that can be used. Different businesses will use different approaches, but any method comfortable for both the business owner and employees will work.

**3-13. The FDA has recommended that all OTC drugs include an NDC code in the bar code. Would this bar code be an effective way to determine taxable status? (i.e., if the product has an NDC code, it's tax-exempt.)**

If the FDA implements an NDC bar code, we will certainly take a look at it to see if the code would be effective in determining the taxable status of a product.

**3-14. Could manufacturing companies code taxable and nontaxable items on packaging in-house? This would greatly help retailers.**

The department is continuing to work with all aspects of the industry to simplify administration of this exemption. Based on information obtained from the Nonprescription Drug Manufacturers Association, it is not feasible to use the manufacturer's bar code to label taxable and nontaxable items. It is our understanding that the Federal Drug Administration assigns a labeling code and the manufacturer assigns the remaining codes on the bar code of each item. It

is not feasible to use the manufacturer's bar code for purposes of the exemption since the coding is not universal to all manufacturers, and the national drug code is not required on the bar code.

We are working with the wholesale industry regarding the coding of nonprescription items for purposes of the exemption. Several wholesale distributors have indicated that they will begin coding nonprescription items exempt. The department is working with these distributors to review their lists of nontaxable nonprescription items.

While we have received a positive response from the wholesale industry regarding the coding of nonprescription items, it is our understanding that it is not feasible for all wholesale distributors to change their systems to accommodate this exemption.

### **NOTIFYING MANUFACTURERS AND SUPPLIERS OF THE NEW EXEMPTION**

- 3-15. I retail and wholesale Watkins products, which are shipped from Minnesota. I have a down line of representatives who purchase directly from the company, and Watkins takes out tax for Virginia. How have manufacturers outside Virginia been notified? Is it our responsibility to notify them?**

If Watkins is registered to collect Virginia sales tax, they should have received Tax Bulletin 98-4, which was issued on May 15, 1998.

- 3-16.\* Our wholesaler is Ohio Valley-Clarksburg, located in Wheeling, West Virginia. It is a division of Cardinal Health. Have they received information regarding these changes? Are you working with them regarding possible identification of nontaxable items for retailers?**

Again, if your wholesaler is registered to collect Virginia sales tax, they should have received the Tax Bulletin. If you would like for us to contact the company, please send their full name, address and telephone number to our Office of Tax Policy, at Post Office Box 1880, Richmond, Virginia 23218-1115.

- 3-17.\* Is Millbrook Distribution Services in Arkansas one of the wholesalers contacted? If not, could they be contacted?**

See Questions 3-15 and 3-16.

## REVENUE IMPACT OF THE EXEMPTION

**3-18.\* What percentage of tax revenue from the 4.5% sales and use tax does the tax on nonprescription drugs represent?**

The tax on nonprescription drugs represents approximately  $\frac{1}{2}$  of 1 percent of the General Fund sales tax revenues for fiscal year 1999. The new exemption will represent a revenue loss of \$34.5 million over the next two years.

## TELECONFERENCE VIDEOTAPE

**3-19. On the order blank for the videotape, should sales tax be added?**

The price of \$7.50 includes sales tax and shipping charges. An additional order form is included in this summary.